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Kitsap County Department of Public Works

614 Division Street (MS-26), Port Orchard, WA 98366-4699 *R. W. Casteel, P.E., Director*

April 12, 2006

Municipal Stormwater Western Washington Phase II Comment
WA Department of Ecology
Water Quality Program
PO Box 47696
Olympia, WA 98504-7696

Re: Comments on Draft Western WA Phase II NPDES Municipal Permit

General Comments:

While the Kitsap County believes in stormwater management that reduces water pollution, flooding and damage to environmentally sensitive areas, we believe management techniques should be equitable, cost effective and attainable. We would like to bring your attention to instances in which we believe the Draft NPDES Phase II Municipal Stormwater Permit fails to meet these criteria.

Pre-development, forested conditions – and legal 'takings' concerns: Language in the permit as drafted requires that stormwater flows be mitigated to meet a standard of pre-development, forested conditions. We believe that in urban and urbanizing environments, this standard is unattainable and raises serious legal concerns. We strongly believe that mitigation requirements outlined in the draft permit would leave our jurisdiction very vulnerable to "takings" claims. Specifically, we cite the *Nollan vs. California Coastal Commission* and *Dolan v. City of Tigard* cases, as well as a March 1995 memorandum from the State Attorney General's Office that reads in part, "...a permit condition which imposes substantial costs or limitations on property uses could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated." The 2001 Herrera Cost Analysis Report (excerpt attached) indicates that the 2005 Ecology manual standard would increase the stormwater mitigation costs of a typical 1-acre commercial development from $40,000 to $570,000 (1290% increase). This mitigation impact appears to contradict the above guidance from the Attorney General.

We recommend that the project proponent must mitigate flows (duration and peak as described in the appendix) to the actual predevelopment land use condition. This change is still in keeping with the anti degradation water quality standard since it would

the flow and water quality characteristics of the road surface are likely unchanged by the overlay process.

Additionally, this policy is counter to development of non-motorized transportation opportunities and traffic safety improvements. If bicycle lanes and sidewalks created by paving an already impervious surface such as a gravel shoulder require full flow rate and water quality mitigation as if they were new, these alternate modes of transportation will either be built at a greatly reduced rate or not at all.

We encourage you to look at the proposed maintenance exceptions found in the Eastern Washington Phase II municipal permit appendix I. These exceptions appear much more balanced and provide for needed traffic safety improvements and maintenance actions while protecting the environment.

Fiscal, liability, and staffing concerns: We are concerned that many Phase II jurisdictions are paying new permit fees under Phase II, and yet Ecology still does not plan to have staffing in place to properly review the Phase II programs that will be submitted. This leaves cities and counties wondering what we are paying for, and whether there will be the "coverage" that we saw as a central reason to go forward with a Phase II permit requirement in the first place. If we have standards that are too high, and a lack of certainty on administrative review and protection, this only serves to *increase* our liability exposure rather than *reduce* it, as was intended.

We encourage you to look for ways to provide a thorough review of Phase II application materials to provide jurisdictions with certainty of compliance.

Specific Permit Comments:

1. Page 4 Table 1: This table states condition S8 monitoring site identification is not reported until 180 days prior to the permit expiration date. However, page 36 lines 3 through 12 require the permitee to submit the data not later than the third annual report. Recommend clarifying the due date for information required under S8.

2. Page 8 line 9: This line refers to section S2.D.c. No such section exists in the permit. Recommend changing this reference to S1.D.2.c.

3. Page 15 lines 11 to19: It is unclear if the maps referred to in S5.C.3.a.i. need to be stand alone maps or if layers within an integrated geographic information system (GIS) are sufficient. Recommend stating that an integrated GIS mapping tool with the above referenced attributes contained within layers is considered sufficient.

4. Page 18 lines 12 to 19: Requires "termination of the connection within 180 days..." Termination of connections or practices may require court action. Jurisdictions cannot guarantee legal timelines decided within the court system. Recommend stating, "termination of the connection must be initiated within 30 days using enforcement authority as needed."

(what pollutants does the BMP remove), and determine the proper design criteria (is the 2005 design standard sufficient or over designed based on the treatment goal).

11. Page 36 lines 13 to 15: This section allows jurisdictions with a single urbanized area to submit a collaborative report. It is unclear if the collaboration allows consolidation of monitoring sites and activities. For example if a county with a population over 100,000 collaborates with 2 cities with populations over 50,000 on BMP effectiveness monitoring, how many BMPs and sites are they required to test? Individually the total number of types of BMPs would be 6 with at least two sites for each type of BMP. Is the number different if these jurisdictions collaborate?

    If the jurisdictions collaborate on program effectiveness monitoring, do two separate actions from each jurisdiction have to be evaluated or can two practices common to all jurisdictions be evaluated?

12. Page 36 lines 17 to 19: As written the permit requires reporting on actions taken through December 31, 2008 on or before March 31, 2008. Recommend changing first annual report period to the effective date of the permit through December 31, 2007.

<u>Appendix I comments:</u>

1. This appendix requires one to mitigate flow to a forested condition. However, for projects in which the predevelopment land cover is not forest, this standard requires mitigation beyond the impact of the proposed development. Such a situation is grounds for a takings claim.

   State of Washington Attorney General's recommended process and advisory memorandum for evaluation of proposed regulatory or administrative actions to avoid unconstitutional takings of private property March 1995 states:

   "However, a permit condition which imposes substantial costs or limitations on property use could be a taking. In assessing whether a regulation or permit condition constitutes a taking in a particular circumstance, the courts will consider the public purpose of the regulatory action along with the extent of reduction in use of and economic impact on the property. The burden on the property owner must be roughly proportional to the adverse public impact sought to be mitigated."

   The 2001 Herrera Cost Analysis Report indicates that the 2005 Ecology manual standard would increase the stormwater mitigation costs of a typical 1-acre commercial development from $40,000 to $570,000 (1290% increase). This mitigation's financial impact appears to contradict the above guidance from the Attorney General.

   We recommend that the project proponent must mitigate flows (duration and peak as described in the appendix) to the actual predevelopment land use condition. This change is still in keeping with the anti degradation water quality standard since it would not result in a lowering of the current water quality. This definition is also

Minimum Requirement 6 - Treatment Facility Sizing. Clarify that Chapter 2 Volume III of Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 6 - Treatment Facility Selection, Design and Maintenance. Clarify that Chapters 4 Volume I and Volume V of Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 7 – Additional Requirement - Clarify that Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 8 – Standard Requirement - Clarify that Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Minimum Requirement 10 – Operation and Maintenance - Clarify that Volume V of Ecology's Western Washington Stormwater Management Manual is the document being referenced.

Appendix III comments:

1. Format of Report: We recommend listing the required reporting parameters by year of the permit as done in the Eastern Washington Permit Annual Report. We recommend duplicating the format used in the Eastern Washington permit annual report. This uniformity would make it easier for the public and Ecology to review for compliance.

2. Actions completed prior to the permit: This report format does not account for actions taken prior to the permit. The questions should be written to account for prior acts such as creation of the stormwater management plan prior to the permit, watershed illicit discharge screening done prior to the permit, and training conducted prior to the permit.

3. Page 3 and 4 *Instructions for cost reporting for specific program components*: The specific components listed in the instructions do not match those in form 1.2. The instructions match the Phase I cost reporting form. Recommend listing the instructions for categories that match form 1.2 for Phase II.

4. Tracking and reporting program expenditures is an unnecessary administrative task. Expenditures and water quality outcomes are not necessarily linked. While it is relatively easy to report total amount of money collected by a stormwater utility, it is not reasonable to request that County's who will have SWMP activities occurring in permit and non permit areas, to segregate their tracking and accounting systems in order to report costs of development and implementation to the state. In addition, Ecology also needs to recognize that other local programs outside of a stormwater utility may be providing services that are not easily tracked or reported as a subset

Our staff contact for these comments is David Tucker, Senior Program Manager Surface and Stormwater Management Program. He can be reached at (360) 337-7292.

Sincerely,

Randy W. Casteel, P.E.
Director of Public Works

cc: Commissioner Jan Angel
Commissioner Chris Endresen
Commissioner Patty Lent
Cris Gears, County Administrator
David Tucker P.E., Senior Program Manager SSWM